COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051781-01**

Bardhyl Larti	Employee
Kennedy Die Castings, Inc.	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Horan)

APPEARANCES
Richard M. Creamer, Esq., for the employee
Nicole M Edmonds, Esq., for the insurer

COSTIGAN, J. The insurer appeals from an administrative judge's decision awarding the employee ongoing weekly § 34 benefits. Because we agree that the judge failed to make findings which reflect he considered all the evidence, made an important finding with no basis in the evidence, and failed to make necessary credibility findings, we are unable "to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Cop. Rep. 45, 47 (1993). Accordingly, we recommit the case for further subsisidary findings of fact.

Bardhyl Larti, age fifty-three at the time of the § 11 hearing, immigrated to this country from Albania in October 1999. (Tr. 37.) He obtained a high school degree in his native country, where he worked as a mechanic. (Dec. 4.) Although he can read English, he has difficulty speaking it. (Dec. 6.) On February 22, 2001, while operating a trim cutting machine for the employer, the press of the machine came down on his right hand, crushing it and puncturing holes in the palm and dorsal surface. He was treated with stitches at the emergency room, (Dec. 4), and returned to work the following day. He continued to work for approximately six months, until August 2001. He was followed by a number of

physicians, (Dec. 5), but by the October 16, 2003 hearing, he had not treated for approximately one year, and had not taken prescription medication for his injuries since August 2001. (Dec. 6.)

The insurer paid a closed period of weekly incapacity benefits, on a without prejudice basis, from when the employee stopped working, on or about August 27, 2001, through February 14, 2002. (Tr. 6; Employee br. 2.) At the hearing, the insurer accepted liability for the employee's February 22, 2001 right palm laceration, (Tr. 4-6), but it did not stipulate that he had been totally disabled during the payment without prejudice period, nor did it accept liability for a subsequent work injury the employee alleged occurred on August 10, 2001. That claim sought § 34 benefits from and after February 15, 2002 and was denied by the insurer. Following a May 2002 § 10A conference on that claim, the insurer was ordered to pay § 34 total incapacity benefits from February 15, 2002 to October 31, 2002, and thereafter § 35 partial incapacity benefits of $105.36, plus § 35A dependency benefits, based on the employee's pre-injury average weekly wage of $445.60 and a $270 assigned earning capacity. Both parties appealed to a hearing de novo. At the hearing, the parties stipulated that the employee did not sustain an industrial

injury on August 10, 2001, and that all benefits claimed were based on his original injury of February 22, 2001.[1] (Tr. 10-11.)

Dr. David Bryan, a plastic and hand surgeon, examined the employee pursuant to § 11A on October 21, 2002. Based on electrophysiologic studies, Dr. Bryan diagnosed Mr. Larti as "status post crush injury of the right hand with a

[1] The judge's decision states the employee's claim was for § 34 temporary total incapacity benefits from and after November 1, 2002. (Dec. 2.) At hearing, however, the judge first identified the claim as "for on-going total incapacity benefits from February 15, 2002," and then as "seeking Section 34 benefits and continuing from November 1st of 2002." (Tr. 8.) The cross-appeals of the conference order, and the de novo nature of the hearing, meant that the periods of incapacity covered by the conference order were at issue; thus, the employee's claim attached as of February 15, 2002.

possible reflex sympathetic syndrome and a right carpal tunnel syndrome," causally related to the injury at work. The impartial physician opined that the employee did not have reflex sympathetic dystrophy at the time of the impartial examination, though he may have had it in the past. The doctor found objective evidence of disability, as well as sensory and motor abnormalities, and severe pain without an identifiable anatomic basis. (Dec. 5-6.) Based only on electro-physiologic studies, he would expect the employee's hand to be functional for light activity but not for repetitive activities, any activity requiring forcible lifting or pushing, or for the use of laboratory tools. The doctor assumed, however, that the employee's subjective responses were truthful, and he believed the employee was experiencing pain during the impartial examination. (Dec. 5-6.) Dr. Bryan concluded that Mr. Larti has "no significant function of his right dominant hand, no significant motion of any digit, and complete absence of pin-prick sensibility in his entire right hand." (Dec. 5.) He opined the employee was at an end point, and that the impairment of his right hand is essentially permanent and total. Id.

The judge adopted Dr. Bryan's medical opinion that the employee has no significant function of his right major hand. Considering Mr. Larti's age, limited ability to communicate in English, and work history and skills, which require the use of his hands, the judge found the employee totally incapacitated. (Dec. 7.) The judge ordered the insurer to pay ongoing § 34 benefits beginning on February 15, 2002. (Dec. 8.)

The insurer first argues that the judge erred by failing to either list as a witness or consider the testimony of Jay Scully, the employer's manager of human resources. We agree. "It is fundamental that a judge weigh and consider the evidence he has admitted." Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997). Where a judge neither lists a witness at the beginning of the decision nor acknowledges that witness's testimony within the decision, we are unable to determine whether he has actually considered that

witness's testimony, thereby assuring an adequate foundation for his conclusions. Lockheart v. Wakefield Eng'g, 16 Mass. Workers' Comp. Rep. 302, 304 (2002); Keefe v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 129, 133-134 (2001); Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999). Only two individuals, the employee and the § 11A impartial medical examiner, are listed as witnesses in the decision. (Dec. 1.) The judge's failure to even acknowledge Jay Scully's appearance as a witness at the hearing, let alone discuss his testimony, is of particular concern, because that testimony touched on several important issues: the appearance of the employee's hand immediately after the injury (Tr. 97); that light duty work was available to the employee for as long as necessary (Tr. 101); that after a week and a half of modified duty, the employee, at his own request, returned to his regular job on the trimmer machine (Tr. 102-103); that at the time the employee left work in August 2001, he was being trained for a higher paying job; and that he, Scully, had offered the employee a light duty position on August 27, 2001. (Tr. 106-107.)

Given the scope of Scully's testimony and the absence of any direct reference to it, or any other findings in the decision which might have been based on it,[2] we cannot be sure that the judge considered the entirety of the employer's

[2] The employee directs us to one finding regarding the way in which the injury occurred as proof that the judge did consider Mr. Scully's testimony: "Mr. Larti was lacerated by components of the trip press machine, [but] the dye [sic] of the machine did not itself press down on Mr. Larti's hand." (Dec. 7.) For two reasons, we cannot conclude that this finding was based on Mr. Scully's testimony. First, the judge did not attribute it to him, but more importantly, the judge made another subsidiary finding of fact which directly contradicts his finding that "the dye [sic] of the machine did not itself press down on Mr. Larti's hand." (Id.) The judge found that the employee's "injury occurred when the press of a machine came down on Mr. Larti's right hand and crushed his hand. . . ." (Dec. 4.) This finding tracks to the employee's testimony, which differs crucially from Scully's:

> Q. And now, you told us earlier that how when you described the injury, you said that you hold one lever, and you had your hand reaching for the product and the cutting piece of the machine actually came down on your hand. That is your version of how the accident happened; is that correct?

testimony. Contrary to the employee's contentions, Mr. Scully's testimony was relevant to the issues of extent of incapacity and earning capacity, and could have affected his award of benefits. On recommittal, the judge must make such findings as will ensure that he has taken that testimony into account in formulating his conclusions. Saccone, supra at 283; Warnke, supra. Cf. Armstrong v. Commercial Technology, 16 Mass. Workers' Comp. Rep. 100, 101 (2002)(so long as judge recognized written report of vocational expert as an exhibit, no requirement that he discuss every bit of evidence, including that exhibit); Lindsey v. Stop & Shop Cos., 15 Mass. Workers' Comp. Rep. 295 (2002)(harmless error for judge not to list videotape as exhibit where it was not germane to his reasoning in awarding benefits).

The insurer also argues that the judge's determination of no earning capacity is flawed because he failed to make findings, as required by G. L. c. 152,

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A. No. No. After the machine trims the extra pieces around, the machine went up. At that point – so at that point, when the machine went back up, I reached to remove the metal part. At that point, the trim cut fell down.

. . .

Q. So, Mr. Larti, is it your testimony that the injury to your hand was caused by the dye [sic] cutting piece of the machine actually coming down on your hand?

A. Yes. This is my version. And the cutting part, the cutting die part, fell together with the machine, the X of the machine.

Q. Okay. Well, I just want to clarify, what you are testifying to is that the machine actually cycled and came down on your hand, is that your testimony?

A. Yes. This is [my] version.

(Tr. 43-44.)

Even if, as the employee argues, one of the judge's two irreconcilable findings as to how the injury occurred is based on Jay Scully's testimony, we are left with the judge's failure to resolve the conflict by adopting one witness's testimony over another's. Moreover, because the impartial physician's opinions are based on a history of the employee sustaining a crush injury to his right hand, the judge must make a definitive factual finding on the nature of the injury. "[T]he history upon which the medical expert relies is crucial to his opinion." Saccone, supra at 282, citing Parent v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995).

§ 35D(3),[3] regarding the two written job offers made by the employer, on December 10, 2001, and on January 30, 2002, after the employee had left work. (Exs. 4 and 5.) Since those job offers do not identify a specific job and are instead general promises to make accommodations,[4] they are of "dubious adequacy." Akoumianakis v. Stadium Auto Body, Inc., 17 Mass. Workers' Comp. Rep. 385, 391 (2003); Cassidy v. Sodexho USA, 14 Mass. Workers' Comp. Rep. 42, 44 (2000). However, Mr. Scully also testified that when the employee presented him with a doctor's note putting him out of work in August 2001, he offered Mr. Larti the same light duty job he had performed for a week and a half immediately after his February 22, 2001 injury. (Tr. 107.) The employee corroborated Mr. Scully's testimony that light duty work he could perform with only his left arm was offered to him on August 27, 2001, but he stated that he was not able to perform it. (Tr. 61.) Since this offer appears to have been for a specific job, the judge must make further findings as to whether the job remained available to the employee in February 2002, and whether the employee could perform it. See Akoumianakis, supra at 391; see also O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16, 23-24 (2004).

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[3] General Laws c. 152, § 35(D), provides four alternative means of determining earning capacity. Relevant here is § 35(D)(3), which requires that the judge consider:

> The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.

[4] Both job offers stated, in pertinent part:

> We will provide you with a light/modified duty assignment and make accommodations to respect any restrictions imposed by your doctor. Those accommodations may include jobs with no lifting, carrying, pushing or pulling above 5 pounds or reduced hours until you are able to resume normal hours and duties.

(Exs. 4 and 5.)

Further, the insurer maintains that the judge's finding that the employee worked *modified* duty for six months after the injury, from February until August 2001, is not supported by the evidence. (Dec. 6.) The insurer correctly points out that both the employee and Mr. Scully testified that, after a week and a half of modified duty, the employee returned to *full* duty, though their testimony differed as to the job the employee was performing and why he returned to full duty. The employee testified that he went back to unmodified work on a different, heavier machine -- the "molder" -- because he was not being paid his full wages while on modified duty.[5] (Tr. 20, 53-55.) Mr. Scully testified that the employee requested to be put back on a trim cutting machine, that the employer complied, and that he worked full duty in that position for six months. According to Mr. Scully, at the time the employee stopped working in late August 2001, he was being trained to work in a higher paying position as a molder on the die casting machine. (Tr. 104-105.)

Findings of fact must be adequately supported by the evidence and reasonable inferences drawn therefrom. Judkins' Case, 315 Mass. 226, 228 (1943). Crucial findings without evidentiary support are arbitrary and capricious and necessitate recommittal. McCarty v. Wilkinson, 16 Mass. Workers' Comp. Rep. 307, 309 (2002); Candito v. Browning-Ferris Indus., 15 Mass. Workers' Comp. Rep. 199, 122 (2001). Here, the judge's finding that the employee worked modified duty for six months is wholly lacking in evidentiary support. This finding is crucial because it bears on the issue of the extent of the employee's incapacity: if he was able to perform full duty for six months and, as stipulated by the employee, no new injury occurred at the end of that time, what transpired to cause the employee to become totally incapacitated for work as of February 2002? See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4-5

[5] The employee, however, has never claimed § 35 partial incapacity benefits for that period of time.

(1993)(we must be able to look at the subsidiary findings and clearly understand the logic behind the judge's ultimate conclusion).

The testimony of the employee and Mr. Scully conflict regarding the position in which the employee was working full-duty (trimmer versus molder). Therefore, on recommittal, the judge must make credibility findings on the actual job duties the employee was performing between February 2001 and August 2001. See Candito, supra at 123, citing Carney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 492, 494 (1995)(where there are conflicts in the evidence requiring credibility assessments, fact finder must resolve the issues). The judge must also reconsider his finding of total incapacity, taking into account the undisputed fact that the employee was working full duty rather than modified duty at the time he left work, and that the issue of the extent of the employee's incapacity during the pay-without-prejudice period from August 27, 2001 to February 15, 2002 was not raised at hearing.

Finally, we agree with the insurer's third argument: the judge failed to make credibility findings regarding the employee's subjective complaints of pain, numbness and limitations in support of his finding of total incapacity. The impartial physician could find no organic or anatomic basis for many of the employee's complaints, (Dep. 33, 38), and based his opinion that the employee had "no significant function of his right dominant hand" on his assumption that the employee was being truthful regarding his pain and limitations. (Dep. 38-39.) However, when asked about the employee's incapacity based only on objective findings causally related to the employee's injury (i.e., electrophysiologic studies revealing carpal tunnel syndrome), Dr. Bryan opined that Mr. Larti's hand would be functional for light activity but not for repetitive activities, using laboratory tools, or for any activity requiring forcible lifting or pushing. (Dec. 6; Dep. 40.) He further testified that, "discounting physical examination findings, many of which are a result of subjective responses from the patient as they always are, I

would say yes, he would have a functioning hand to some degree," (Dep. 41), or "at least a useful assist hand." (Dep. 37.) The judge adopted Dr. Bryan's medical opinion that the employee has no significant function of his right dominant hand and found the employee's disability causally related to his employment, but made no findings regarding the extent to which he credited the employee's subjective complaints.

A judge's belief of an employee's complaints of pain may provide a basis for a finding of total incapacity in the face of a medical opinion of only partial disability. See, e.g., Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990). Conversely, a judge's disbelief of an employee's complaints of pain may provide a basis for rejecting a medical opinion of total disability. Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 319 (2003); Credibility findings are the sole province of the hearing judge and generally will not be disturbed unless they are arbitrary and capricious. See Lettich's Case, 402 Mass. 389, 394 (1988); Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). But it is essential that the judge make those credibility findings, particularly when, as here, the impartial physician has opined that, depending on whether the employee's complaints of pain are credited or not, the employee would have greater or lesser use of his hand. As we have often stated, the judge's ultimate finding that the employee is totally disabled "must emerge clearly from the matrix of his subsidiary findings." Crowell, supra at 5. Here, the judge merely recounted Dr. Bryan's assumption that the employee's subjective complaints were genuine, and that he was giving correct responses when examined. (Dec. 6.) The judge cannot properly defer such a credibility determination to an impartial physician. Moynihan v. Wee Folks Nursery, Inc. 17 Mass. Workers' Comp. Rep. 342 (2003).[6] Without specific

[6] In Moynihan, we held that the doctor improperly had assumed the judge's role in making the ultimate credibility call, thereby triggering substantial due process concerns. Here, the impartial examiner's opinion presents no such due process concerns. Dr. Bryan

findings on the extent to which the judge credited the employee's subjective complaints, his finding of total incapacity cannot stand. See Marble v. Milton Hosp., 16 Mass. Workers' Comp. Rep. 164, 168 (2002).

Accordingly, we recommit the case to the administrative judge for further findings of fact consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 28, 2005**

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was asked to, and did, give his opinion of the employee's incapacity, both taking into account the employee's subjective complaints and disregarding those complaints. It remains for the judge to make findings regarding his own view of those subjective complaints.